

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 69 OF 2017

1. Taibai w/o Rangnatghrao Santanse,
Deceased (Deleted as per order
of the Hon'ble Court dt.27.07.17
 2. Madhusudan S/o Mahadev Sovale,
Age : 78 Yrs, Occ. Pensioner,
R/o Abhinav Co-operative Housing
Society, Aurangabad
 3. Rajendra S/o Rangnathrao Santanse,
Age : 43 Yrs, Occ. Trader,
R/o Maya Nagar, Plot No.102,
N-2, CIDCO, Aurangabad
- .. PETITIONERS
(Original Accused)

V E R S U S

The State of Maharashtra,
Through The Police Station Officer,
Mukundwadi Police Station,
Aurangabad.

.. RESPONDENT

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Mr. K.H.Surve, Advocate for Appellants.

Mr. S.Y.Mahajan, A.P.P. for Resp. - State.

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CORAM : V.L.ACHLIYA, J.

DATE : 03rd AUGUST, 2017

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OREAL JUDGMENT :

1. **Rule**, returnable forthwith. Learned A.P.P waives notice for the respondents. By consent, petition heard finally.

2. In view limited challenge raised in the petition, it is not

necessary to deal with factual aspect of the matter.

3. By the present petition, the petitioner has challenged order dated 15.10.2016 passed by the Judicial Magistrate First Class, Aurangabad in Regular Criminal Case No. 1005/2013. By the impugned order, learned Judicial Magistrate, First Class, Aurangabad has rejected the application moved by the petitioner seeking permanent exemption from the appearance.

4. Heard the learned counsel for the petitioner and APP for the State. Perused the application seeking permanent exemption filed by the petitioner and the order passed by the trial court. It appears from the record that, petitioners are charged for committing offence punishable under section 406,420,468,471 r/w 34 of the Indian Penal Code with allegations that they have created false and fabricated documents of will and got transferred the plot located in the area CIDCO, N-2, Aurangabad. The petitioner along with deceased accused Taibai moved application vide Exh. 25 before the trial court seeking permanent exemption. They have sought the permanent exemption on the ground of old age as well as ill-health. By the impugned order dated 15.10.2016 the trial court has rejected the application by observing that the age of the accused No.3 is only 37 years and no medical certificate produced in support of illness of the accused no.1 and 2. Being aggrieved, the petitioners have preferred this petition. During the pendency of the

petition, petitioner No.1 Taibai i.e. accused No.1 expired.

5. In nutshell, it is the contention of the learned counsel for petitioners that, the order passed by trial court is totally based upon non application of mind. It is pointed out that, in the charge-sheet itself the ages of the accused No.1 and 2 have been disclosed as 71 and 73 years respectively. It is further submitted that, in view of statement made in the application, that accused will not raise any objection as to their identification, the court ought to have granted the application. He further submits that, while dealing with the application, trial court ought to have taken into consideration the very object of Section 205 of the Code of Criminal Procedure.

6. Learned APP has supported the order passed by trial court and submits that in absence of evidence to show the illness of accused No.3, the trial court was justified in passing the impugned order.

7. Section 205 of the Code of Criminal Procedure confers the discretion on the court to exempt the accused from personal appearance till such time his appearance is considered by the Court to be not necessary during the trial. While dealing with such application, seeking personal exemption the Magistrate has to bear in mind the nature of the case, the conduct of the accused and necessity of personal attendance of the accused on each and every date of hearing of the case. It is expected

that Magistrate should examine the useful purpose which would be achieved by requiring personal attendance of the accused. He has also to take into consideration the effect of absence of accused over the progress of the trial. Thus, exercise of powers under section 205 of the Code of Criminal Procedure is necessarily exercise of judicial discretion by the Magistrate. Such powers are to be exercised in a judicious manner. No hard and fast rules can be laid down as to exercise of such discretion by the Magistrate. However, while dealing with the application in terms of section 205 of Code of Criminal Procedure, the court is expected to consider whether any useful purpose would be served by insisting the personal attendance of the accused on each and every date of hearing of case. The court may consider to grant personal exemption from appearance up to a particular stage or till further orders, as the court may deem fit and proper. Even in a case wherein the accused granted exemption it is found that, the grant of exemption from personal appearance to accused resulting into hampering the progress of the case, in that eventuality then the court may call upon such accuse to personally attend the court. The courts are expected to normally adopt a balanced approach and ensure that the accused are not subjected to unnecessary harassment and particularly in the cases filed at the instance of the private party. While considering such powers the courts should adopt a liberal and humanitarian approach in the case of women, old, infirm and sick persons.

8. In the instant case, in the charge-sheet itself the age of accused No.1 and 2 have been shown as 71 and 73 years respectively. The charge-sheet was filed in the year 2013. At the time of the application, the age of applicant Nos.1 and 2 were about 73 years and 76 years, respectively. The court ought to have taken into consideration their age as well as the nature of the offence while dealing their application seeking permanent exemption. It appears that, the case is filed on account of certain dispute regarding the property. While passing the order the court has observed that the age of the applicant No.3 is 43 years and the documents regarding illness of accused No.1 and 2 have not been filed on record. In fact, the learned Magistrate ought to have examined the case of each of the accused separately. The age of the applicant No.1 and 2 should have been taken into consideration while dealing with the application for the purpose of granting exemption. Disclosure of ailment and documentary evidence, should not have been given much weightage. In this view, the order passed by the trial court appears to be passed without due application of mind.

9. In the case of **Bhaskar Industries Ltd. Vs. Bhavani Denim & Apparels Ltd and Others (2001) 7 Supreme Court Page No.401.** the Apex Court while considering the purport of section 205 of the Code of Criminal Procedure, observed in paras 14 and 19, as under :-

“14. The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the

absence of the accused such evidence can be taken but then his counsel must be present in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just for the sake of seeing him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused persons may have to bear with in order to make himself present in the court in that particular case.

19. The position, therefore, boils down to this: it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in a rare instances where due to the far distance at which the accused reside or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with personal attendance of the accused would only be in the interest of the justice. However, the Magistrate who grant such benefit to the accused must take the precaution enumerated above, as a matter of

course. We may reiterate that when an accused makes an application to a Magistrate through his duly authorized counsel, praying for affording the benefit of his personal presence being dispensed with the Magistrate can consider all aspect and pass appropriate orders thereon before proceeding further.”

10. Thus in the light of discussion made in the forgoing paras, I am of the view that, impugned order passed by the learned Magistrate is without proper application of mind.

11. In the result I am inclined to allow the petition and set-aside the impugned order further grant liberty to the petitioners to move fresh application supported with documents. Learned Magistrate is directed that in case such application is filed, the application be decided on its own merit.

12. The rule made absolute in the above terms.

[V.L.ACHLIYA, J.]

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